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In The
Supreme Court of the United States

RICHARD PRYOR AND CAPITOL AVENUE HOMES, INC.,
Petitioners,

v.

THE CITY OF LANSING,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix

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QUESTIONS PRESENTED

1. When a city conditions the grant of a sewer permit for two homes on an unimproved public road on the owner agreeing to install on the right-of-way a public sewer extension for the use of up to six more homes and to pay for road improvements to be used by others without cost, has the City committed an uncompensated taking under *Dolan v. City of Tigard,* 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994)?

2. Under the circumstances previously stated, has the City violated Equal Protection by treating some users of the public improvements differently from other users without sufficient reason?

3. Which Circuit Court of Appeals' statement of the rules of claim preclusion correctly describes the test for determining whether there is an "identity of causes of action"?

4. If Petitioners did not raise their takings and Equal Protection arguments the first time the City violated them, is the City immunized against later violations?

LIST OF PARTIES

Richard Pryor

Capitol Avenue Homes

The City of Lansing

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PETITION FOR WRIT OF CERTIORARI

Richard Pryor and Capitol Avenue Homes, Petitioners, respectfully pray that a writ of certiorari issue to review the opinion and order of the United States Court of Appeals for the Sixth Circuit entered on July 16, 2003, and for which reconsideration was denied on September 17, 2003.

CITATIONS OF REPORTS OF OPINIONS AND ORDERS

The opinion of the Western District of Michigan was unpublished. The July 16, 2003 Opinion and Order of the Sixth Circuit is unreported. The September 17, 2003 Sixth Circuit denial of reconsideration is unreported. All are included in the Appendix.

CONCISE STATEMENT OF BASIS OF JURISDICTION

The Sixth Circuit's Opinion and Order were issued on July 16, 2003. The Sixth Circuit denied reconsideration on September 17, 2003. The Supreme Court's jurisdiction is invoked under Supreme Court Rule 10(a), in that the Sixth Circuit has entered a decision in conflict with another United States Court of Appeals on the same matter.

CONSTITUTIONAL PROVISIONS, AND CITY ORDINANCES AT ISSUE

Constitution of the United States of America

Amendment 5:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 14, sec. 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

City of Lansing, Resolution 363

ACT-16-95, N. Capitol at North St. Vacation of Capitol Ave.

RESOLUTION #363
ACT-3-92/ACT-8-93
113/117/119 WEST NORTH STREET

WHEREAS the Lansing Parks Department is desirous of purchasing the properties at 113-117-119 West North Street for the purpose of expanding the Turner-Dodge House facilities, and

WHEREAS the Lansing Planning Division has reviewed the proposal and recommends the expansion and the relocation of the residential structures to nearby vacant lots on Capitol Avenue, and

WHEREAS the Lansing Planning Board has reviewed the report of the staff and concurs therein, and

WHEREAS the Physical Development Committee of Lansing City Council has reviewed the report of the Planning Board and concurs therein,

NOW THEREFORE BE IT RESOLVED that

1. The properties at 113 and 119 West North Street be purchased immediately and placed in public auction subject to the following:

a. That a notice be placed in a newspaper of general circulation advertising the auction and specifying the following:

(1) That each structure would be offered for sale along with a vacant building site on North Capitol Avenue being a part of Lots 40 and 41. Dodge Park Addition.

(2) That the moving costs will be the sole responsibility of the purchaser.

(3) That the rehabilitation costs are the responsibility of the purchaser and must be completed within one year of the date of relocation.

(4) That the purchaser must close on the property within thirty days of the auction and will be responsible for all closing costs.

(5) That a $5000 deposit of "earnest" money be placed in an escrow account prior to or on the day of the action by each bidder and that disclosure of financial capability to complete this project may be requested.

(6) That the purchaser is responsible for the extension of all utility services from West North Street to the building site, including but not limited to

storm and sanitary sewer, water, electrical and gas services.

(7) that the purchaser will be responsible for street improvements, including curb and gutter.

b. That the proceeds of this sale be designated for deposit in the Parks Department Acquisition and Development Account.

2. That the City negotiate an option or "right of first refusal" for the property at 117 West North Street with the understanding that when this property has been purchased by the City, it will be sold at public auction under the same conditions listed above for the properties at 113 and 119 West North Street.

BE IT FURTHER RESOLVED that the City administration be directed to prepare and execute the appropriate documents to complete the above transactions, including the arrangements for the sale and signing the transfer documents for the two vacant parcels on N. Capitol Avenue, more commonly described as:

Lots 40 and 41, of Frank L. Dodge Subdivision, City of Lansing, Ingham County, Michigan, as recorded in Liber 7 of Plats, Page 14, Ingham County Record.

Lansing City Ordinance 1042.11

1042.11 Charges on sewers constructed through letters of intent

(a) Where a sewer, sanitary sewer or storm sewer is constructed by a landowner through a letter of intent wherein such landowner pays the cost of construction and where, upon completion, the sewer so constructed becomes the property of the City and a part of the City's sewerage system, and where a landowner whose land abuts such sewer who did not bear any of the cost of the construction thereof subsequently connects a new or existing structure thereto, such abutting landowner shall be charged for each abutting foot of such sewer in an amount equal to the average per-foot cost of the three public contracts of the City bid during the fiscal year of the letter of intent for the construction of storm sewers of similar diameter and depth.

(b) Such charge shall be paid prior to the issuance of a permit for connection and is in addition to any other charge or rate specific in this chapter. The charge provided for in subsection (a) hereof shall be equally divided among the parcels of land specified in the letter of intent, which were to be initially benefitted by the sewer. The charges so divided shall be used to reduce, for nor more than ten years, any special

assessments on such land, or if there are none, to reduce the property taxes on the land.

(Ord. No. 408, 12-1-75)

STATEMENT OF THE CASE

A. Facts

The City of Lansing wanted to use a federal grant to develop one of its historic properties: the Dodge-Turner property. The property had two historic homes that had to be removed. The City put the two homes up for auction, along with two lots on an adjoining public road, Capitol Avenue. Capitol is a city street, with public rights-of-way, but it is unpaved and without city lighting. There are no curbs or gutters. The existing sewer ran along North Street; a water line ran along Capitol. One home, on a double lot, existed between the auctioned lots and the sewer on North Street.

Under City Resolution 363, the successful bidder would be required to post a bond, move the homes to the lots on Capitol Avenue, "extend" utilities to the homes (including sewers, water, electricity, and gas), and rehabilitate them.

In 1993, Richard Pryor was the successful bidder. He posted performance bonds and had the homes moved. He rehabilitated the homes, spending about $150,000 on the project. Originally, all Mr. Pryor had to do was connect to

the existing sewer. Over the next several years, the City kept changing its demands. It would agree to a plan, and then withdraw approval. It would agree that he could install private leads, then demand that he install a public sewer extension at his own cost. It would suggest privatizing the road, and then table the matter.

When Mr. Pryor found out that the City of Lansing possibly required more from him than a simple sewer hookup, he filed Case No. 96-83850-NZ in Ingham County Circuit Court ("the state case"). The causes of action were false advertising and misrepresentation (bait and switch), fraud, breach of contract, and violation of Michigan's Consumer Protection Act,M.C.L.445.90*et seq.*("MCPA") On January 6, 1996, the trial court ruled that the MCPA did not apply to this transaction, as it was not a consumer transaction but a commercial transaction. It also ruled that the tort claims were invalid because of governmental immunity. Finally, it ruled that the breach of contract claim had to fail because the law presumes that Mr. Pryor knew or should have known of Resolution 363. On May 18, 1999, the Michigan Court of Appeals affirmed.

Mr. Pryor also filed Case No. 5:98-CV-125, captioned *Pryor v. Clegg, et al.* (*"Pryor I"*) in the Western District of Michigan. His first cause of action was that the City failed to process his application for a permit by failing to specify what he had to do under Resolution 363, and that this failure deprived him of property without due process. On June 11, 1999, the District Court ruled that the City had no duty to

specify the improvements for him, and that there was no procedural due process violation. Mr. Pryor's other cause of action was a complaint that the City impeded him from completing the project in retaliation for his criticism of the City. This, he argued, was a violation of the First Amendment. On June 11, 1999, the District Court ruled that there was no evidence from which a jury could find retaliation by the City. His appeal was dismissed for lack of prosecution.

Those issues are concluded.

After the cases were finished, however, the City of Lansing reversed itself once again. In *Pryor I,* the City's engineers testified that Mr. Pryor had been advised that he could run private leads from each home to the existing sewer system. But in the year 2000, after the case was dismissed, the City refused to permit such a hookup. Rather, it insisted that Mr. Pryor install a sewer extension for the use of up to eight homes, and insisted that he improve a street that he does not own. This was the first time the City had demanded the construction of a cul-de-sac (on property that neither Petitioner owns). The deposition testimony and post-litigation correspondence are attached in the Appendix.

B. Proceedings below

On August 28, 2001, Mr. Pryor filed and served on the City the complaint and motion for summary judgment. Mr.

Pryor's motion was based on the contention that the City did not have authority under Michigan law to demand that one user install public works for the benefit of many as the price of a permit. He also contended that these conditions for a sewer permit violated the Equal Protection and Takings clauses of the U.S. Constitution. On October 10, 2001, the City filed an answer and its motion for summary judgment based on claim preclusion and issue preclusion.

After briefs were filed, the District Court heard argument on November 7, 2001. On November 29, 2001 it denied Mr. Pryor's motion and granted the City's motion. In its Opinion and Order, the Court held that claim preclusion barred all of the case, with the possible exception of the cause of action accruing in the year 2000. As to that portion of the case, the Court held that the City's demands were not unconstitutional.

On December 26, 2001, Mr. Pryor appealed to the Court of Appeals for the Sixth Circuit. The matter was argued on June 19, 2003 and decided on July 16, 2003. The Court of Appeals held that the entire case was barred by claim preclusion. The basis for this decision was that "the claims litigated in the first federal action and the claims presented here arise out of the same transaction; specifically the sale contract executed by Pryor and the City regarding the purchase and improvement of the houses and the North Capitol Avenue lots." The Court also found that the state case barred the case because it, too, arose out of the same transaction: the sale contract.

Mr. Pryor filed a timely motion for reconsideration. The Sixth Circuit denied it on September 17, 2003 (Order is attached in the Appendix). This petition for writ of certiorari followed.

ARGUMENT FOR ALLOWING WRIT OF CERTIORARI

A. Overview

Mr. Pryor expected to pay for hooking up to the existing sewer and paying for any street work necessary to do this or to connect his driveways to the street. What he protests is having his sewer permits held hostage until he agrees to install a public sewer extension for the use of up to six more home at his sole cost, and until he agrees to improve a street that others will use and enjoy without contributing to the improvements.

It is particularly important to review this case because it is representative of the types of property rights attacks being suffered by landowners throughout the United States. It is a continuation of the Court's review of the limits of police power vis-a-vis individual property rights, as reviewed in *Dolan v. City of Tigard,* 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994) and *Village of Willowbrook v Olech,* 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000). Local governments must not be permitted to try to balance their budgets by withholding access to public utilities from selected citizens until they bow to the unconstitutional

demand that they contribute more than their share to public infrastructure costs. Without the guarantee of equal protection, and constitutional protection from extortion, private property will cease to have meaning.

If Mr. Pryor lived in the Ninth or Second Circuits rather than the Sixth Circuit, he would have been afforded review of the District Court's decision that there is nothing constitutionally wrong with making one user pay more for improvements than similarly-situated users. But since the Sixth Circuit uses a different test of claim preclusion (and understands it differently from other circuits), he has been denied that opportunity.

There is a split of authority among federal courts of appeal as to when a two cases have an "identity of causes of action" for purposes of claim preclusion. Even when the circuits agree on the general test, they understand it so differently that, as the Seventh Circuit has complained, the law is reduced to "do what's right." This has led to diametrically-opposed decisions on similar facts. Uniformity of the federal law of claim preclusion can only be stated and enforced by a Supreme Court decision settling the confusion.

B. The Supreme Court Should Announce A Consistent Standard for Claim Preclusion

In general, the federal courts agree that claim preclusion requires 1) a judgment on the merits in the earlier action, 2)

identity of the parties or their privies, and 3) identity of the cause of action. When these three requirements are met, the litigant not only cannot re-litigate the case, but cannot litigate claims that "should have been" raised in the initial case. *Allen v. McCurry,* 449 U.S. 90, 96, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980). The Circuit Courts of Appeal have different tests for what constitutes the "same cause of action;" and when they purport to apply the same rule, they understand the rule so differently that whether a claim is precluded depends greatly on where the litigant lives.

1. Different tests for identity of cause of action

In compiling federal court decisions based on claim preclusion, some commentators have identified as many as six different tests or combinations of tests used to determine whether two suits state the "same cause of action":

1) infringement of the same primary right;
2) the identical legal wrong;
3) the same evidence;
4) the same "operative facts";
5) whether a second case would impair rights secured in the first case;
6) the same "transaction or occurrence."

Res Judicata - Identical Claims, 82 A.L.R. Fed. 829.

While the annotation lists all the theories, the majority of Circuits have adopted the "same transaction or occurrence" test as described in the Restatement of Judgments, 2d, sec. 24. *See, e.g. Manego v. Orleans Bd. Of Trade,* 773 F.2d 1, 15 (1st Cir. 1985); *National Labor Relations Bd. v. United Techs. Corp.,* 706 F.2d 1254, 1260 (2d Cir. 1983); *Harnett v. Billman,* 800 F.2d 1308, 1314 (4th Cir. 1986); *Nilsen v. City of Moss Point, Miss.,* 701 F.2d 556, 560 n. 4 (5th Cir. 1983); *Herrmann v. Cencom Cable Assoc., Inc.,* 999 F.2d 223 (7th Cir. 1993); *Poe v. John Deere Co.,* 695 F.2d 1103, 1106 (8th Cir. 1982); *Petromanagement Corp. v. Acme-Thomas Joint Venture,* 835 F.2d 1329, 1335-36 (10th Cir. 1988); *Young Eng'rs, Inc. v. United States Int'l Trade Comm'n,* 721 F.2d 1305, 1314 (Fed. Cir. 1983); *Page v. U.S.,* 729 F.2d 818, 820 (D.C. Cir. 1984).

The Seventh Circuit, while adopting the Restatement test, expressed its frustration with the test's vagueness:

> It is not much use being told, as by the restaters, that the question of what claims constitute a single transaction is to be decided "pragmatically," with due regard for whether they form "a convenient trial unit," whether the evidence concerning them is similar, and whether "their treatment as a unit conformed to the parties' expectations." [Citations omitted] We're all for pragmatism, but pragmatism is not an operational legal standard. Litigants and their lawyers are entitled to clearer guidance in an area where a false step can result in the forfeiture of

> valuable legal rights than generalities about practicality, convenience, similarities, and expectations can furnish.

Herrmann, supra at 226. *See also Stanton v. District of Columbia Court of Appeals,* 127 F.3d 72, 78 (D.C. Cir. 1997)("Admonitions to pragmatism do not decide cases, and this standard is obviously far from self-explanatory"). Indeed, the circuits adopting the Restatement test understand and apply it differently.

The Seventh Circuit understands it as coming down to whether the two suits "are based on the same, or nearly the same, factual allegations." *Herrmann, supra at* 226. The Fifth Circuit asks whether the claims arise out of the same nucleus of operative fact. *Nilsen, supra at* 559. The Eighth Circuit test combines the two, allowing either to suffice. *Murphy v. Jones,* 877 F.2d 682, 684-685 (8th Cir. 1989). Thus, it suggests that the two measures are not the same. The First Circuit understands the Restatement factors to be a useful framework, but will not be bound by them. *In re Ionnochino,* 242 F.3d 36, 46 (1st Cir. 2001).

Thus, adopting the Restatement position has not resulted in a uniform approach to claim preclusion. It does not help that four circuits (the Third, Sixth, Ninth, and Eleventh) have all adopted other tests.

As recently as 1984, the Third Circuit declined to adopt any one theory of "same cause of action." *U.S. v. Athlone*

Industries, Inc., 746 F.2d 977, 984 (3d Cir. 1984). In that case, however, it leaned toward examining whether there was an "essential similarity of underlying events," including whether the same wrongful acts, same theory of recovery, same evidence, and same material facts were at issue in both suits.

The Sixth Circuit's continuing test has been whether there is an "identity of the facts creating the right of action and of the evidence necessary to sustain each action." *See Cremer v. Marathon Oil Co.*, 583 F.2d 830 (6th Cir. 1978) Unlike the "similarity" test of the Third Circuit, this test is, at least on its face, supposed to require "identity" of the facts and evidence supporting and sustaining the two actions.

The 9th Circuit has a four-part test: 1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; 2) whether essentially the same evidence is presented in the two actions; 3) whether the two suits involve infringement of the same right; and 4) whether the two suits arise out of the same transactional nucleus of facts. *First Pacific Bancorp, Inc. v. Helfer,* 224 F.3d 1117 (9th Cir. 2000).

The 11th Circuit determines whether the cause of action is the same by determining "whether the primary right and duty are the same." *Manning v. City of Auburn,* 953 F.2d 1355, 1358 (11th Cir. 1992). This is a subset of the factors that other federal courts review.

Thus, while purporting to apply one federal common law of claim preclusion, the Circuit Courts of Appeal have created different tests. The common law has been devenoming to the point where the Supreme Court should enforce one test that best supports the policy behind claim preclusion. This will bring uniformity to the administration of federal law.

2. Dissonant Results

The various tests and different understandings of the factors to be considered has led to results that cannot be explained by anything other than geography.

For example, in *Frank v. United Airlines, Inc,* 216 F.3d 490 (9th Cir. 2000), the court in the first suit ruled that the weight limitation policy for flight attendants was not discriminatory on its face. After the case, the airline revised its weight policy, using a different weight table. Flight attendants sued again for new incidents under the new policy, and the 9th Circuit determined that this constituted a "different transaction," thus permitting a new suit. By contrast, the Second Circuit held that employees could not sue on new incidents under a revised sick leave policy in *Monahan v. New York City Dept of Corrections,* 214 F.3d 275, 289 (2d Cir. 2000). This, according to the Second Circuit, could not be a new "transaction."

Continuing claims involving fraud in the sale of securities have also been treated differently in different Circuits. In

SEC v. First Jersey Securities, Inc., 101 F.3d 1450 (2d Cir. 1996), a brokerage maintained the same fraudulent sales scheme for several different securities, sold at different times. The Second Circuit found these to be different transactions. In *Gonzalez v. Banco Cent. Corp.*, 27 F.3d 751, 756 (1st Cir. 1994), a developer sold what it represented to be developable lots to different customers at different times; but they were all Florida swampland that could not be built upon. The First Circuit declared these to be one "transaction."

Some courts apply claim preclusion to anything occurring before judgment in the first case, *Harnett v. Billman, supra at* 1315; while others preclude only matters occurring before the complaint is filed, *Manning, supra at*, 1360.

Circuits have varied in their treatment of single developments. In *Sierra Club v. Secretary of Transp.*, 779 F.2d 776 (1st Cir. 1985), the Sierra Club filed two different suits concerning the construction of the same bridge. The First Circuit held that the two suits did not concern the same "transaction" because they were based on different types of permits for the construction. In this case, by contrast, the Sixth Circuit (under an "identity of underlying facts" analysis) held that the fact that the cases involved the same two homes and connection to the same utilities constitute the "same transaction."

Only the statement of one rule, based on one set of factors will bring order and uniformity to the application of federal claim preclusion.

C. Dolan must be enforced.

In *Dolan, supra*, the Court reiterated that the doctrine of unconstitutional conditions prohibits a municipality from basing the grant of a permit on the forfeiture of constitutional rights. The two rights at issue in this case are 1) the right to be compensated for government "taking" of property, and 2) equal protection.

1. Uncompensated Taking

Specifically, the Court acknowledged that a community could grant or deny permits based on its police powers, but it also recognized that the Constitution requires the government pay for property it takes for common use. Thus, the Court held that exacting property as a condition for a permit is an unconstitutional taking of property without compensation unless: 1) there is an "essential nexus" between the taking of the property and a legitimate state interest, 512 U.S. at 386, 129 L.Ed.2d at 317; and 2) the city makes an "individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." 512 U.S. at 391, 129 L.Ed.2d at 320. The standard is one of "rough proportionality."

Here, the City will not issue sewer permits to Mr. Pryor unless he forgoes the individual sewer leads permitted by the ordinances and installs a public sewer extension for the use of up to six more homes (which he does not own). This, the City claimed, would promote development. But paying 100% of the cost for 25% of the usage is not an exaction roughly proportional to the impact of Mr. Pryor's two homes. Similarly, the City has not shown that putting two more homes on an undeveloped public road now requires the road to be paved, lit, curbed, and equipped with a cul-de-sac. Many are expected to continue to use the road; but only Mr. Pryor need pay for the improvements (assuming some way to get access to his neighbors' property for the cul-de-sac). This, under *Dolan, supra,* constitutes a taking – an exaction of property, rather than a regulatory taking.

The District Court analyzed the takings claim under *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978) and held that since Mr. Pryor would not be deprived of all use of his land, there was no regulatory taking. But the *Dolan* court pointed out that individual exactions as the price of permits are a different type of taking:

> The sort of land use regulations discussed in the cases just cited, however [*Penn Central, supra,* and progeny], differ in two relevant particulars from the present case. First, they involved essentially legislative determinations classifying entire areas of the

> city, whereas here the city made an adjudicative decision to condition petitioner's application for building permit on an individual parcel. Second, the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city.

Dolan, supra 512 U.S. at 385, 129 L.Ed.2d at 316. While the City is not demanding a strip of Mr. Pryor's land (since his property would not include the proposed cul-de-sac), it is demanding that he buy materials, hire professionals to plan and install them, and dedicate them to the City. The Court has recognized the taking of personal property or claims to such property as a "taking" that must be compensated under the 5th Amendment. *See e.g. Armstrong v. U.S.*, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960)(re boat hulls).

The Court should grant review, so that the District Court's error does not permit the City to force Mr. Pryor to choose between a utilities permit and an uncompensated taking of property.

2. Equal Protection

Unless Mr. Pryor finds a way to take his neighbors' property and spends far more than his fair share of the cost, he will not be permitted any utilities. His entire investment in the homes will be forfeited. But if he builds the public

sewer extension and improves the road, other users will get the improvements for free. No one else will be assessed for the road improvements. Nor will anyone be assessed under Ordinance 1042.11 to share the costs of the proposed public sewer extension. There are no empty lots between Mr. Pryor's two homes and the existing sewer (other than the corner home on a double lot, which is already connected to the existing sewer). Any new homes will not "abut" the Pryor-built extension, so they will not have to pay for any abutting lineal feet of pipe. Thus, other users will get for free the infrastructure for which Mr. Pryor alone has to pay. This is a violation of Equal Protection, as explained by *Olech, supra.*

It is no secret that despite Supreme Court rulings requiring local governments to respect private property rights, local governments and lower courts are resisting those rulings.

In *Lambert v. San Francisco,* 529 U.S. 1045 (Mem), 120 S.Ct. 1549, 146 L.Ed.2d 360 (2001), the three Justices dissenting from denial of certiorari referred to such demands as extortion. In commenting further, the Justices noted:

> The first two of the conceivable bases for the Court of Appeal's decision are so implausible as to call into question the state court's willingness to hold state administrators to the Fifth Amendment standards set forth by this tribunal. There is reason to believe that this may be more than a local

and isolated phenomenon. See, *e.g.* Delaney, *Development Agreements: The Road from Prohibition to "Let's Make a Deal!"* 25 Urb. Law. 49, 52 (1993)("In addition to anti-development attitudes and vesting problems, property owners and developers are confronting decisions of state courts which either ignore or do not follow the 'essential nexus' standard set forth in *Nollan v. California Costal Comm'n* to validate development exaction"(footnote omitted)); M. Berger, Recent Developments in the Law of Inverse Condemnation, Q203 ALI-ABA Video Law Review Study 1, 4 (1991) ("Last year, we noted that the California appellate courts had reacted to the Supreme Court's decision in *First English Evangelical Lutheran Church v. County of Los Angeles,* (1987) 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 and *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825, 107 S.Ct. 3141 by seeking ways to evade their evidence mandate, either procedurally or substantively").

Id., 120 S.Ct. 1551-1552. Others note:

> Across the nation, dozens of grassroots advocacy groups have formed in recent years to defend private property rights from assault by officials at all levels of government. Those groups have arisen because officials have aggressively

> disregarded property rights and courts have done little to vindicate those rights.

Eagle, Steven, "The Birth of the Property Rights Movement," 404 *Policy Analysis* (June 26, 2001), p.3. Indeed, aside from the sources cited in Prof. Steven's article, simple internet searches easily uncover many web pages and statements testifying to Americans' growing militancy in seeking to defend their property. *See e.g.* Defenders of Property Rights (at www.yourpropertyrights.org), Property Rights Foundation of America, Inc. (at prfamerica.org), Coalition for Property Rights (at www.proprights.com), and www.landrights.com. Existing public advocacy groups or law firms, such as Institute for Justice (at www.ij.org) are devoting efforts to preserve homes from governmental intrusion. While the web pages cited have wildly varying degrees of coherence and accuracy, their number and passion are testimony to the radicalization of Americans fearing for their property.

This is a clear case, and a convincing one, for the Court to insist that local governments respect property rights.

CONCLUSION

Petitioners respectfully submit that the Sixth Circuit erred in precluding the entire case, including the portion based on actions taking place after the judgment in the earlier cases.

Petitioners also respectfully submit that the Western District of Michigan erred in finding that making one of many users of public infrastructure bear alone a sizable portion of cost neither constitutes an uncompensated taking of property nor violates Equal Protection.

Therefore, Petitioners respectfully pray that this Court grant this Petition for Writ of Certiorari, reverse the Sixth Circuit and Western District of Michigan decisions, and remand for remedy.

Respectfully Submitted,
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70 Fed.Appx. 810
(Cite as: 70 Fed.Appx. 810, 2003 WL 21674745 (6th Cir.(Mich.»)

This case was not selected for publication in the Federal Reporter.

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 28(g) limits citation to specific situations. Please see Rule 28(g) before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

Please use FIND to look at the applicable circuit court rule before citing this opinion. Sixth Circuit Rule 28(g). (FIND CTA6 Rule 28.)

United States Court of Appeals,
Sixth Circuit.

Richard PRYOR and Capitol Avenue Homes, Inc., Plaintiffs-Appellants,
v.
CITY OF LANSING, Defendant-Appellee.

No. 01-2745.

July 16, 2003.

After real estate developer brought suit against city and city engineers in state court alleging false advertisement and misrepresentation, fraud, and breach of contract, developer

filed civil rights suit in federal court, claiming that city engineers' failure to process his sanitary sewer applications denied him his property without procedural due process, and that their conduct violated his right to free speech because it was in retaliation for his criticism of them. The United States District Court granted summary judgment in favor of defendants. Developer then filed another suit in federal court, alleging that city's demands for developing the property at issue constituted a taking of private property without compensation and was in violation of the Equal Protection Clause. The United States District Court for the Western District of Michigan granted summary judgment in favor of city, and developer appealed. The Court of Appeals, Kennedy, J., held that developer's claims of violation of his constitutional rights were precluded by his prior state and federal actions.

Affirmed.

West Headnotes

[1] Eminent Domain <8=283 148k283 Most Cited Cases

[1] Judgment <8=585(2) 228k585(2) Most Cited Cases

Fact that city engineer suggested that developer could construct private, rather than public, sewer leads and road for development did not mean that city had changed development's infrastructure design requirements as outlined in city council resolution, and thus, the suggestion did not mean that city committed any allegedly new or continuing violations of developer's constitutional rights under equal protection or takings clauses, where engineer lacked authority to change resolution, and city's subsequent

correspondence indicated city had not changed project conditions; therefore, developer's takings and equal protection claims in federal court were precluded by doctrine of claim preclusion, in light of developer's previous federal court action in which he asserted the same claims, arising out of same transaction, and involving same parties. U.S.C.A. Const.Amend. 14.

[2] Eminent Domain <8=283 148k283 Most Cited Cases

[2] Judgment <8=828.16(3) 228k828.16(3) Most Cited Cases

Under Michigan law, real estate developer's takings and equal protection claims in federal court were precluded by doctrine of claim preclusion, in light of developer's previous state court action, where claims in both actions arose out of the same transaction, which was sale contract executed by developer and city, and a diligent plaintiff could have raised the federal claims in the previous state action. U.S.C.A. Const.Amend. 14.
*811 On Appeal from the United States District Court for the Western District of Michigan.

Before: KENNEDY and COLE, Circuit Judges; and WILLIAMS, District Judge. [FN*]

Copr. «:J West 2003 No Claim to Orig. u.s. Govt. Works

70 Fed.Appx. 810
(Cite as: 70 Fed.Appx. 810,2003 WL 21674745 (6th Cir.(Mich.»)

FN* Honorable Glen M. Williams, United States District Judge for the Western District of Virginia, sitting by designation.

KENNEDY, Circuit Judge.

**1 Richard Pryor and Capitol Avenue Homes, Inc. [FNl] appeal the district court's summary judgment in favor of the City of Lansing (City). We AFFIRM the judgment of the district court for the following reasons.

FNI. Richard Pryor is the sole shareholder in Capitol Homes, Inc.

I.

On August 20, 1993, Pryor purchased two undeveloped platted lots (Lots 40 and 41 in the Frank L. Dodge Subdivision) with frontage on Capitol A venue, an unimproved public road, and two houses located at 113 and 119 West North Street from the City for $400 at a public auction. The sale of the houses and lots were subject to conditions set forth in Resolution 363, which was passed by the Lansing City Council on June 28, 1993. The conditions, in relevant part, included:
(1) That each structure would be offered for sale along with a vacant building site on North Capitol Avenue being part of Lots 40 and 41, Dodge Park Addition.

(2) That the moving costs will be the sole responsibility of the purchaser.
(3) That the rehabilitation costs are the responsibility of the purchaser and must be completed within one year of the date of the relocation.
...
(6) That the purchaser is responsible for the extension of all utility service from North Street to the building site, including but not limited to storm and sanitary sewer, water, electrical and gas services.
(7) That the purchaser will be responsible for street improvements, including curb and gutter.

Pryor filed three Letters of Intent (dated October 25, 1993, October 31, 1995, and January 18, 1996) requesting permission to bring sanitary sewer service to the houses, which had been relocated to the North Capitol A venue lots. At an unknown point in time, Pryor also submitted engineering drawings, prepared by Kyes Engineering, for the proposed sanitary sewer extension to the Capitol A venue properties. [FN2]

FN2. The record indicates that the plans were marked as Kyes drawing number 93-35, which suggests that the plans were first prepared in 1993.

The January 18, 1996 Letter of Intent was accepted by the City on January 31, 1996, subject to standard conditions pre-printed on the Letter of Intent application. In correspondence also dated January 31, 1996, a city engineering assistant advised Kyes Engineering of the specific plan revisions necessary for the construction to be approved. Kyes Engineering submitted its revised sanitary sewer extension design with correspondence dated

November 25, 1996. Pryor did not pursue the matter any further.

*812 On June 1, 1995, Pryor petitioned to vacate the North Capitol Avenue right-of-way. On October 3, 1995, the Lansing Planning Board unanimously recommended approval of the vacation to the City Council. On November 7, 1995, the City Council's Committee on Physical Development tabled the request to permit study by an absent member. Pryor did not pursue the matter any further.

Pryor then filed suit in state court alleging (1) false advertisement and misrepresentation under the Michigan Consumer Protection Act, M.C.L. § § 455.901 et seq. (2) fraud, and (3) breach of contract. The named defendants were two city engineers, Robert Clegg and Robert Rose, Mayor David Hollister, and the City of Lansing. On December 11, 1996, the county circuit court granted summary disposition in favor of the City on all claims. On May 18, 1999, the Michigan Court of Appeals affirmed.

**2 While Pryor's state court appeal was pending, he filed suit in federal court under 42 U.S.C. § 1983 claiming (1) that City Engineers Robert Clegg and Robert Rose's failure to process his sanitary sewer applications denied him his property without procedural due process, and (2) that their conduct violated Pryor's right to free speech because it was in retaliation for Pryor's criticism of them. On June 11, 1999, the district court granted summary judgment in favor of the defendants, holding that Pryor failed to identify what constitutional procedural due process rights he had been deprived him of, and that Pryor failed to demonstrate that the defendants had taken any adverse actions against him

or that there was any basis to infer retaliation.

On April 28, 2000, counsel for Capitol Avenue Homes, Inc., sent a letter to the current City Engineer asking what it needed to do to comply with Resolution 363. The City responded by letter dated June 14, 2000, answering each question based on the requirements of Resolution 363 and the applicable city ordinances and design standards.

Plaintiffs filed the instant action on August 27, 2001 alleging (1) that the City's demand that Plaintiffs "acquire additional property, build[ ] the City's infrastructure on it, and giv[e] it to the City for free" constitutes a taking of private property without compensation in violation of the Fifth Amendment, as applied through the Fourteenth Amendment, and (2) that the City's demand that Plaintiffs "build the City's infrastructure as a precondition to providing City services" is a violation of the Equal Protection Clause of the Fourteenth Amendment because the City is treating Plaintiffs differently than similarly situated developers. On November 29, 2001, the district court granted summary judgment in favor of the City. Plaintiffs filed a timely appeal.

II. Discussion

The district court's summary judgment decision is reviewed de novo. Plaintiffs contend that the district court erred when it granted summary judgment in favor of the City, finding that Plaintiffs' claims were barred by the prior federal and state litigation. This Court applies its own rules of claim and issue preclusion when determining the preclusive effect of a prior federal court action. *EEOC* v. *Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 462-63 (6th

Cir.1999). We apply a state's rules regarding claim and issue preclusion when determining the preclusive effect of a prior state court action. *Spence* v. *TRW, Inc.*, 92 F.3d 380, 382 (6th Cir.1996). As an initial matter, we note that in their arguments regarding the applicability of preclusion rules to this action, the parties do not dispute that the previous federal and state actions were decided on the merits or that the actions involved the same parties. *813 On the basis of the parties agreement as to these matters, we consider the previous litigation decided on the merits and the parties the same for the purpose *of* this case.

A.

**3 [1] Plaintiffs' Takings and Equal Protection claims are precluded by the previous federal court action. In the Sixth Circuit, claim preclusion applies to a subsequent federal court action if (1) the prior federal action was decided on the merits; (2) the subject matter contested in the second federal case was or could have been resolved in the first federal case; and (3) both actions involved the same parties or their privies. *Frank's Nursery,* 177 F.3d at 462. With respect to element *two,* the claims litigated in the first federal action and the claims presented here arise out of the same transaction: specifically the sale contract executed by Pryor and the City regarding the purchase and improvement *of* the houses and the North Capitol A venue lots.

Plaintiffs' contention that the present claims are not precluded because the City has committed a new or continuing violation of his constitutional rights by allegedly changing the infrastructure design requirements applicable to the project is without merit. In the first federal

action, City Engineer Clegg testified that city staff had suggested that Pryor might be able to get approval to construct private sanitary sewer leads, rather than a public sewer, and to construct a private road, rather than a public street. Clegg, however, lacked authority to change the conditions of the contract executed by the parties. Changes to the conditions set forth in Resolution 363 could only be executed by mutual agreement of the City Council and Pryor. Subsequent correspondence from the City makes clear that the City has not changed the conditions it seeks to impose on the project and that the City expects Plaintiffs to improve the North Capitol A venue properties in accordance with Resolution 363.

B.

[2] Plaintiffs' Takings and Equal Protection claims are also precluded by the previous state court action. Under Michigan law, claim preclusion applies to a subsequent state court action if (1) the former suit was decided on the merits; (2) the subject matter raised in the second action was or could have been resolved in the former action; and (3) both actions involve the same parties or their privies. *Bergeron* v. *Busch,* 228 Mich.App. 618, 620-21, 579 N.W.2d 124 (1998). Michigan Court Rules in effect at the time of the state litigation provided that:

> Failure to object in a pleading, by motion, or at a pretrial conference to improper joinder of claims or failure to join
>
> claims required to be joined constitutes a waiver of the joinder rules, and the judgment shall only merge the claims actually litigated. This rule does not affect collateral estoppel or the prohibition against relitigation of a claim under a different theory.

Mich. Ct. R. 2.203(A)(2) (repealed June 1, 1999). Plaintiffs contend that because the City did not object to Pryor's failure to join all his claims, the City waived the joinder rules and the state court judgment only merged the claims actually litigated. The district court rejected this argument, noting that claim preclusion still applies to the state court action by the plain terms of the rule. We agree. Notwithstanding the scope of the waiver exception Rule 2.203(A)(2) attempted to create, it is clear that the rule did not intend to prevent the application of the common law rules of collateral estoppel (issue preclusion) and claim preclusion.

**4 Plaintiffs further argue that Michigan law does not bar this action because the *814 facts alleged in connection with Pryor's state court action could not support either a Takings or Equal Protection claim. In support of this argument, Plaintiffs point to *Board of County Commissioners for County of Eaton* v. *Schultz,* in which the court refused to preclude a claim raised in a subsequent action even though the claim could have been raised as a counterclaim in the first action on the ground that causes of actions and defenses should not be treated interchangeably for the purposes of claim preclusion. 205 Mich.App. 371, 376, 521 N.W.2d 847 (1994). In *Sprague* v. *Buhagiar,* however, the court precluded a claim under the same circumstances. 213 Mich.App. 310, 539 N.W.2d 587 (1995). The Michigan Court of Appeals has noted but not resolved this split of authority. *Karp* v. *Michigan Nat'l Bank,* 2001 WL 721383 (Mich.App. Feb.27, 2001) (unpublished). Even if the exception recognized by the *Eaton County* court is approved by the Michigan Supreme Court, the rule has no application in this case because

Plaintiffs present claims could not have arisen as a defense in the previous state court action.

As the Michigan Supreme Court has observed, " 'Michigan courts have broadly applied the doctrine of res judicata. They have barred, not only claims already litigated, but every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not.' " *Sewell* v. *Clean Cut Mgmt.*, 463 Mich. 569, 621 N.W.2d 222, 226 (2001) (quoting *Gose* v. *Monroe Auto Equip. Co.*, 409 Mich. 147, 294 N.W.2d 165 (1980)). The claims litigated in the state court action and the claims presented here arise out of the same transaction; specifically the sale contract executed by Pryor and the City regarding the purchase and improvement of the houses and the North Capitol Avenue lots. Because a diligent plaintiff could have raised the present claims in the previous state action, Plaintiffs are barred from litigating those claims here.

III. Conclusion

For the foregoing reasons, we AFFIRM the judgment of the district court.

70 Fed.Appx. 810, 2003 WL 21674745 (6th Cir.(Mich.))

Case No: 01-2745

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED Sept. 17, 2003

ORDER

RICHARD PRYOR; CAPITOL AVENUE HOMES, INC., a private corporation,

Plaintiffs - Appellants,

v.

THE CITY OF LANSING, a municipal corporation,

Defendant - Appellee.

BEFORE: KENNEDY and COLE, Circuit Judges; WILLIAMS, District Judge*

Upon consideration of the petition for rehearing filed by the appellants,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

***Honorable Glen M. Williams**, United States District Judge for the Western District of Virginia. sitting by designation.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

RICHARD PRYOR, and CAPITOL AVENUE HOMES, INC., a private corporation,
Plaintiffs,

File No. 5:01-CV-I05
HON. ROBERT HOLMES BELL

v.

CITY OF LANSING, a municipal corporation,
Defendant.

ORDER

In accordance with the opinion entered this date,

IT IS HEREBY ORDERED that Plaintiffs' motion for preliminary injunction and summary judgment (Docket #5) is **DENIED.**

IT IS FURTHER ORDERED that Defendant's motion for summary judgment (Docket #15) is **GRANTED.**

IT IS FURTHER ORDERED that **JUDGMENT** is entered in favor of Defendant, and Plaintiffs' complaint is **DISMISSED** in its entirety.

Date: November 29,2001

/s/ Robert Holmes Bell
ROBERT HOLMES BELL
CHIEF UNITED STATES
DISTRICT JUDGE

Certified as a True Copy

Ronald C. Weston, Sr. Clerk

Deputy Clerk U. S. District Court
Western District of Michigan

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RICHARD PRYOR, and CAPITOL AVENUE HOMES, INC., a private corporation,
Plaintiffs,

File No. 5:01-CV-105
HON. ROBERT HOLMES BELL

v.

CITY OF LANSING, a municipal corporation,
Defendant.

OPINION

Before this Court are Plaintiffs Richard Pryor ("Pryor") and Capital Avenue Homes, Inc.'s (collectively" Plaintiffs") motion for summary judgment and preliminary injunction and Defendant City of Lansing's (the "City" or "Lansing") motion for summary judgment. In this action, Plaintiffs assert violations of the Fifth Amendment's Taking Clause and the Fourteenth Amendment's Equal Protection Clause in conjunction with Lansing's requirement that Plaintiffs build sewers, curbs, and other infrastructure ("infrastructure requirement") to connect to utilities. As explained below, Plaintiffs' motions are **DENIED,** and Defendant's motion is **GRANTED**.

I.

In 1993, the City of Lansing sold two lots and two homes as part of a community redevelopment project. The lots and homes were sold together because one of the conditions of the sale was to move the homes from their existing location to the new lots. Plaintiff Pryor purchased the properties for $400 and moved the homes to the new lots. When Plaintiff Pryor went to connect the homes to utilities at their new location, he discovered that the City expected him to build the infrastructure for the utilities including sewers and curbs. Plaintiff Pryor disputed this infrastructure requirement as a condition of the sale and sued the City and two of its employees in state court.

The state court dismissed Plaintiff Pryor's claims with prejudice. On appeal, the Michigan Court of Appeals specifically noted that Plaintiff Pryor "fail[ed] to provide any legal authority to support his position." *(Pryor* v. *Clegg,* No. 200 720, slip op . at 1 (Mich. Ct. App. May 18, 1999), Def.'s Ex. 22). Despite this lack of legal authority, the Michigan Court of Appeals did address the merits of Plaintiff Pryor's claims and affirmed the circuit court's dismissal of all claims.

Plaintiff Pryor then sued two City employees in federal court. *Pryor v. Clegg,* No. 5:98-CV-125, 1999 U.S. Dist. LEXIS 9175 (W.D. Mich. June 11,1999). Pryor claimed that the employees failed to specify the infrastructure in the infrastructure requirement and that this action was in retaliation for his criticisms of the City. The City employees moved for summary judgment, and this

Court granted the motion in June 1999. Plaintiff Pryor appealed to the Sixth Circuit, and the Sixth Circuit dismissed the appeal for want of prosecution. Plaintiff Pryor and his corporation, Capital Avenue Homes, Inc., filed this action on August 27, 2001.

II.

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED.R.Crv.P.56(c). An issue concerning a material fact is genuine if the record as a whole could lead a reasonable trier of fact to find for the nonmoving party. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242,248 (1986).

Under Rule 56, the court must view the evidence in a light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 158-59 (1970). Summary judgment is not proper if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson,* 477 U.S. at 248. Summary judgment is proper if the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to the party's case for which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett.* 477 U.S. 317,322 (1986).

III.

Defendant claims that it is entitled to summary judgment because this case is barred by the principles of res judicata and collateral estoppel. Although "res judicata" is generally understood to bar the relitigation of the same claim or cause of action and "collateral estoppel" is generally understood to bar the relitigation of the same issue, *Drummond* v. *Comm'r of Social Sec.*, 126 F.3d 837, 840 (6th Cir. 1997), this Court will follow the recommendation of the Sixth Circuit Court of Appeals and refer to these concepts as "claim preclusion" and "issue preclusion." *Heyliger* v. *State U. & Comm. Coil. Sys. of Tenn.*, 126F.3d 849, 852 (6th Cir. 1997) (citing *Barnes* v. *McDowell*, 848 F.2d 725, 728 n.5 (6th Cir.1988)). When analyzing the effect of a prior state court action, the state's rules concerning claim and issue preclusion are applicable. *Spence* v. *TRW, Inc.*, 92 F.3d 380,382 (6th Cir. 1996). If the prior litigation was in federal court, then the Sixth Circuit's tests for claim and issue preclusion govern. *See E.E.O.C. v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 462-63 (6th Cir. 1999).

Defendant argues that the prior state litigation provides a basis for claim preclusion. "Michigan has adopted a broad application of res judicata [(claim preclusion)] that bars claims arising out of the same transaction that plaintiff could have brought but did not." *Bergeron* v. *Bush*, 228 Mich. App. 618, 620-21,579 N.W.2d 124, 126 (1998). Claim preclusion applies when "(1) the prior action was decided on the merits, (2) the matter contested in the second case was or could have been resolved in the first, and (3) both actions involved the same

parties or their privies." *Id.* at 621, 579 N.W.2d at 126. The parties do not appear to dispute that the prior action was decided on the merits and that both Plaintiff Pryor and the City were parties to the state court action. Instead, Plaintiffs argue that Defendant has waived claim preclusion under MICH. CT. R. 2.203(A)(2), that Defendant has not satisfied the second requirement for claim preclusion, and that as this case represents a continuing claim, claim preclusion is not applicable.

First, contrary to Plaintiffs' contention, Defendant has not waived claim preclusion. When these parties litigated in state court, Michigan Court Rules provided that:

> Failure to object in a pleading, by motion, or at a pretrial conference to improper joinder of claims or failure to join claims required to be joined constitutes a waiver of the joinder rules, and the judgment shall only merge the claims actually litigated. This rule does not affect collateral estoppel or the prohibition against relitigation of a claim under a different theory.

MICH. CT. R. 2.203(A)(2) (repealed effective June 1, 1999). Plaintiffs claim that unless Defendant objected to non-joinder of the Takings Clause and Equal Protection Clause claim in the state action, Defendant has waived res judicata and that nothing in the record suggests an objection. The rule specifically states that it "does not affect. . . the prohibition against relitigation of a claim under a different theory." Claim is defined as "a demand for money or property as of right." BLACK'S LAW DICTIONARY 247 (6th ed. 1990). A theory is the "[f]acts

on which the right of action is claimed to exist [or t]he basis of liability or grounds of defense. BLACK'S LAW DICTIONARY 1478 (6th ed. 1990). In other words, even under the Michigan Rule, claim preclusion still applies. Consequently, Defendant has not waived the argument that claim preclusion applies to this case.

Similarly, Plaintiffs' second argument that this state case did not involve the same matter fails. Plaintiffs, like some courts, have confused claim preclusion and issue preclusion. *Heyliger,* 126 F.3d at 852 (6th Cir. 1997) (noting "the perennial confusion over the vocabulary and concepts of the law of preclusion "); *Bhama v. Bhama,* 169 Mich. App.73, 81, 425 N.W.2d 733, 737 (1988) (applying issue preclusion but describing it as *res judicata* or claim preclusion). Res judicata is more commonly used to refer to claim preclusion and not issue preclusion. *Heyliger,* 126 F.3d at 852 (6th Cir. 1997). Unlike issue preclusion, claim preclusion does not require that the prior litigation involve the resolution of a exactly the same issue currently before a court in the second case. In Michigan, the requirement is only that "the matter contested in the second case was or could have been resolved in the first." *Bergeron,* 228 Mich. App. at 621, 579 N.W.2d at 126. Plaintiff Pryor certainly could have raised both a Takings Clause and an Equal Protection Clause argument in his state case. Because Plaintiff Pryor did not raise these claims in the state court action, claim preclusion bars both he and his corporation from raising them here.

Plaintiffs' third argument that Defendant's conduct represents a continuing violation may have some merit. The alleged continuing violation is based on supposed changes to the infrastructure requirement by the City since the state court litigation. Specifically, Plaintiffs contend that during the state court litigation, the City agreed that Plaintiff Pryor could connect individual leads from his houses to North Street. (Pl.'s Br. Opp'n at 2 citing Def's Ex. 5 at 22, Ex. 7 at 12). According to Plaintiffs, the City refused to permit this type of connection after the state court litigation. (Pl.'s Br. Opp'n at 2 citing Def.'s Ex. 19). In the latter communications, the City does appear to emphasize that the leads would have to be public. To the extent the City did change its position, Plaintiffs are not barred by claim preclusion from the. prior state court action. If these alleged changes in position are not barred by the prior federal court action, the Court will address the merits of these alleged changes.

Even assuming that this action is not barred by the prior state court action, claim preclusion from the prior federal court action still bars most of Plaintiffs' claims in this case. Claim preclusion prevents "litigation of claims that 'were previously available to the parties, regardless of whether they were asserted or determined in the first proceeding.'" *E.E.O.C. v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 462-63 (6th Cir. 1999)(quoting *Brown v. Felsen*, 442. U.S. 127, 131 (1979)). Claim preclusion applies when "(1) the prior action was decided on the merits, (2) the matter contested in the second case was or

could have been resolved in the first, and (3) both actions involved the same parties or their privies." *Id.*. at 621.

Plaintiffs dispute the application of claim preclusion because the claims are not the same and the City has engaged in continuing violations. Again, Plaintiffs fail to properly distinguish claim preclusion and issue preclusion. Claim preclusion does not require that both the first and second cases involved identical issues. Instead, the requirement is merely that any claims in the second suit could have been resolved in the first suit. Plaintiff Pryor could have brought his Takings Clause and Equal Protection Clause claims before this Court in the earlier federal proceeding.

On the other hand, Plaintiffs are correct that if the City has changed the infrastructure requirement since the prior federal litigation, then Plaintiffs could not have raised their current claims under the Takings Clause and the Equal Protection Clause at the time of the prior federal action. Like the previous state court case, the prior federal case does not bar Plaintiffs from raising their claims based on changes to the infrastructure requirement. Consequently, the Court will address the merits of Plaintiffs' Takings Clause and Equal Protection Clause claims based only on changes by the City to the infrastructure requirement since the prior federal case.

Addressing the merits of Plaintiffs' Fifth Amendment's Takings Clause, this Clause "is [intended] to prevent the government 'from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Franklin County Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 552 (6th Cir. 2001) (quoting *Armstrong v. United States,* 364 U.S. 40, 49 (1960)). "Because the takings analysis focuses on 'fairness and justice,' it is necessarily an ad hoc standard." *Id.* Despite the ad hoc nature of the standard, there are still several relevant factors including: "the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action.'" *Id.*. (quoting *Kaiser Aetna v. United States,* 444 U.S. 164,174-75 (1979)).

Preliminarily, the Court notes that Plaintiffs claim the City was without authority for the infrastructure requirement and that this lack of authority constitutes their argument that the infrastructure requirement was in violation of the Takings Clause. This argument is not persuasive. Although Plaintiffs suggest that the City's resolution "does not say that [Plaintiff Pryor] has to build the City's infrastructure," (Pl's Br. Supp. at 3), the resolution does state: "That the purchaser is responsible for the extension of all utility services West North Street to the building site, including but not limited to storm and sanitary sewer, water, electrical and gas services. That the

purchaser will be responsible for street improvements, including curb and gutter." *Pryor* v. *Clegg,* No. 5:98-CV - 125, 1999 U.S. Dist. LEXIS 9175, *2 (W.D. Mich. June 11, 1999). Plaintiffs' reading of the resolution ignores this clear language. Similarly, Plaintiffs contention that the resolution is void as *ultra vires* is explicitly contradicted by the Michigan Court of Appeals decision "that the sale of property, along with its terms and conditions, constituted a governmental function and not an ultra vires activity." *(Pryor* v. *Clegg,* No. 200720, slip op. at 4 (Mich. Ct. App. May 18, 1999), Def.'s Ex. 22).

Having dispensed with Plaintiffs' arguments that the infrastructure requirement is a taking, the Court evaluates the facts with reference to the factors relevant to a takings claim. This analysis indicates that the City's actions do not constitute a taking. Although building the necessary infrastructure obviously will have a significant economic impact, Plaintiffs cannot argue that this requirement interferes with Plaintiffs' reasonable investment expectations. Plaintiff Pryor only paid $400 for two houses and two lots, and he had to realize that the properties were so reasonable because there were other costs associated with the purchase. In addition to moving the homes, these other costs included the City's infrastructure requirement. Similarly, the character of the governmental action here indicates that there is no taking. The infrastructure requirement is part of the sale agreement that Plaintiff Pryor entered into with the City. Plaintiff Pryor did not have to purchase the properties if he did not want to be obligated to install the necessary infrastructure.

Consequently, Plaintiffs have not demonstrated that the City's actions constitute a taking.

Like Plaintiffs' Fifth Amendment Takings Clause claim, Plaintiffs have not established a violation of the Fourteenth Amendment's Equal Protection Clause. The basis of any equal protection claim is that the state has treated similarly-situated individuals differently. *Silver v. Franklin Twp. Bd. Of Zoning Appeals,* 966 F.2d 1031, 1036 (6th Cir.1992). Because Plaintiffs do not claim an infringement of a fundamental right or membership in a suspect class, the City's actions are reviewed using the rational basis test. *Id.* (citing *Belle Terre v. Boraas,* 416 U.S. 1,8 (1974)). When applying the rational basis test, the City's actions are "'accorded a strong presumption of validity' and will be upheld if 'any reasonably conceivable state of facts' could demonstrate that [the City's actions are] rationally related to a legitimate government purpose." *Ashki v. I.N.S.,* 233 F.3d 913,920 (6th Cir. 2000) (quoting *Heller v. Doe,* 509 U.S. 312, 319-20 (1993)).

Here, there is no question that the City's actions are rationally related to a legitimate government purpose. The City wanted to develop the area where it sold the homes and lots to Plaintiff Pryor. With this goal in mind, the City sold Plaintiff Pryor these properties for only $400 knowing that Plaintiff Pryor would provide the necessary infrastructure for connecting the utilities. This method of buying the necessary infrastructure by the City is rational. Therefore, Plaintiffs' Fourteenth Amendment Equal Protection claim fails.

In conclusion, Plaintiffs' claims are barred under claim preclusion by the prior state court action and the prior federal court action except to the extent that the City has changed the infrastructure requirement. Plaintiffs could have raised these new claims in either of the prior actions but choose not to do so. Consequently, claim preclusion bars them from instituting this action. To the extent that the City changed the infrastructure requirement, Plaintiffs are not barred as these claims were not available until the City changed its position. Plaintiffs, however, do not prevail on either their Fifth Amendment Takings Clause claim or their Fourteenth Amendment Equal Protection Clause claim. The City's actions do not constitute a taking in violation of the Takings Clause and are not irrational in violation of the Equal Protection Clause. Therefore, Plaintiffs' motion for preliminary injunction and summary judgment is **DENIED,** and Defendant's motion for summary judgment is **GRANTED.** Accordingly, an order consistent with this opinion will be entered.

Date: November 29, 2001

/s/ Robert Holmes Bell
ROBERT HOLMES BELL
CHIEF UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

RICHARD PRYOR,
Plaintiff,

Docket *No.*: 5:98-CV-125
JUDGE ROBERT HOLMES BELL

vs

ROBERT CLEGG, ROBERT ROSE, Individuals,
Defendants.

The Deposition of **ROBERT CLEGG** was taken in the above-entitled matter before Notary Public, Christine A. Hagle, at One Michigan Avenue, Suite 780, Lansing, Michigan, on **March 1, 1999**, commencing at about 9:00 a.m.

APPEARANCES:

Law Offices of Mark T. Light
BY: MARK T. LIGHT, J.D. (P16673)
115 West Allegan, Suite 910
Lansing, Michigan 48933
(517) 484-6161

Appearing on behalf of the Plaintiff.

Plunkett & Cooney, P.C.
BY: DAVID K. OTIS, J.D. (P31627)
One Michigan Avenue, Suite 780 .
Lansing, Michigan 48933
(517) 487-0088

Appearing on behalf of the Defendants.

DOLMAN TECHNOLOGIES GROUP, INC.
P.O. BOX 26125
LANSING, MICHIGAN 48909
(517)393-1668

* * *

eight inch sewer capable of handling more than 200 houses?

A. I can't answer your question right now. I don't know. I would have to do some quick calculations.

Q. Do you need some pencil and paper to do that?

A. I need pencil and paper; I need a calculator. I need to sit down and do some calculations.

Q. You can't say without doing calculations whether or not you were requiring somebody for two houses to service -- to put in a sewer that would handle 200 houses?

A. My city staff required them to install a sewer that met city standards and the ten state standards of the State of Michigan, Act 245, Public Act 451, part 98. ... As the requirements of those acts, you must construct at minimum sewers in accordance with the ten state standards, and those pipes were required to be installed to public standards as they were proposed to be public sewers.

Q. Do the requirements prohibit the hook-up of the two houses from where they are on Capitol Avenue to North Avenue directly, as opposed to building a separate sewer?

A. As long as two separate leads were constructed, and that was explained to Mr. Pryor in meetings, that if

he built a sanitary sewer lead from the buildings, individual leads -- because the city ordinance says that you cannot connect more than one structure or dwelling unit to a private lead. This was explained to Mr. Pryor in meetings, that he had an option to build a sanitary sewer lead from the building all the way out to North Street, which was -- I think it was going to be over 200 feet in length, if I recall.

Q. Okay.

A. And that was permitted, but that was never proposed in a drawing. And we did explain that if that was to traverse that entire area, that if he proposed to go over someone else's property -- in other words, if for any reason -- that there would -- he would have to affirm that he had access to maintain those leads. In other words, we are always careful whenever a private lead is run those kind of lengths, that whoever owns the property in the future will always have access to maintain and take care of that line.

Q. Okay. Let me ask you this question. If you have got leads being built from the two houses -- one from each one to North Street, is that correct?

A. Uh-huh (affirmative).

Q. How big would those leads have to be?

A. They would probably be six-inch leads, that kind of length.

Q. They would have to be made out of what kind of material?

A. Minimally, a Schedule 40 or a PVC 23.6, or they can be clay or they can be whatever. That option was provided to Mr. Pryor, if he so desired, if he met other conditions, of course, as far as access.

Q. When you say access, North Street was a dirt road at the time, *is* that correct?

A. North Street was an unimproved road.

Q. Unimproved road?

A. It wasn't a road at all.

Q. By access, what are you referring to?

A. He would have to be able to show that he had clear rights with the property owner, whoever the property owner was, now and into the future, would have clear rights to access that lead along its entire length to maintain it or whatever, and to ensure that no one else could build on top of it and so on.

Q. The city has a right-of-way on Capitol Avenue there, correct?

A. Correct.

Q. If the leads were run directly underneath the right-of-way, would that meet that requirement?

A. Yes.

Q. Okay. Basically, so long as the leads were run down north Capitol Avenue within the right-of-way and assuming they met the PVC requirements that you have indicated, he could hook it up directly to north Capitol Avenue?

A. Yes.

Q. Thank you. There is a phrase, Number 7, that Refers to Exhibit A, quote – I am quoting from the Exhibit; the Resolution will speak for itself – that the purchaser will be responsible for street improvements including curb and gutter. Would your office have been the appropriate office for determining what those improvements, required improvements, would be?

A. Once the Resolution indicates that that is what is required, yes.

Q. Okay. Were you present at certain meeting in which that issue was discussed, whether the road would be privatized and what would be required to improve the roadway to meet your standards?

A. Prior to the Resolution being passed?

Q. No, subsequent to the Resolution being passed.

A. Subsequent to the Resolution being passed there was meetings of various committees of City Council, one

MARK T. LIGHT
ATTORNEY AT LAW
2375 WOODLAKE DR.
SUITE 320OKEMOS, MICHIGAN 48864
(517) 381-1730

April 28, 2000

City Engineer
Dean Johnson
Public Service Dept
7th Floor, Rm 732
124 W. Michigan
City Hall
Lansing Mi. 48933

Re: 1611 and 1617 N. Capitol

Dear Sir,

Please be advised that I represent Capitol Ave Homes Inc. who has recently obtained these two properties. Please be further advised that they wish to comply with the Resolution passed by City council relative to these two properties.

We have received the previous correspondence you have sent. However, we are unable to comply because of lack of specificity. We need to know the following:

1. Can we connect sanitary sewers to North East St. through private property at our own expense?

2. If not, what is the minimum sanitary sewer requirements necessary to meet the resolution.

3. What is the minimum road width necessary to meet resolution requirements?

4. How far does the road have to be extended?

5. What are the minimum requirements for storm sewers, curbs, gutters, and sidewalks necessary to meet the resolution?

6. Will adjacent land owners be required to contribute?

7. If not, will they be able to use these sewers?

Please be advised that we need a different response that to tell us to ask our engineer or to refer us to previous documents. We need to know exactly what is necessary to comply with the resolution.

We wish to move immediately on this matter. We ask for a reply within 14 days

Respectfully Submitted,

MARK T. LIGHT (P16673)
Attorney for Plaintiff
2375 Woodlake Dr., Suite 320
Okemos, MI 48864
(517) 381-1730

Public Service Department
ENGINEERING DIVISION

732 City Hall
124 West Michigan Avenue
Lansing, Michigan 48933
(517) 483-4455
FAX: (517) 483-6082

Mayor David C. Hollister

June 14,2000

Mark Light
2375 Woodlake Drive Suite 320
Okemos, MI 48933

Re: 1611 and 1617 N. Capitol Avenue

Dear Mr. Light:

My staff and I have reviewed your request for information regarding the above properties. Please find our response to your specific requests.

Item I. Only if the sanitary sewer constructed by your client is dedicated as a public sewer and that appropriate easements can be secured. Public sewer meaning a sewer in which all abutting property owners have equal rights and which is controlled by the City. This sewer must be public because it will serve more than one structure and there exists the possibility of additional properties being developed along Capitol Avenue in the future.

Item 2. If the property owner elects to construct a public sanitary sewer main, the minimum size of the sewer pipe itself is set by the State of Michigan and is 8" inches in diameter. The pipe must be C-700 extra strength vitrified clay. The slope of this sewer will depend on the grade of the existing public sanitary sewer in E. North Street and the design specifications set forth in the "10 States Standards" manual.

Item 3. The minimum road surface width shall be 22 feet, excluding the width of the curb and gutter. A cul-de-sac shall be provided at the end of the street. The cul-de-sac shall provide a pavement diameter of 90 feet and a right-of-way diameter of 120 feet. The right-of-way provided for the street shall be a minimum of 50 feet.

Item 4. The road shall be extend from E. North Street. It will be extend so as to include the entire frontage of both these properties and shall provide for the cul-de-sac described above.

Item 5. Minimum storm sewer, curbs, gutters, and sidewalk:

a. the storm sewer will need to be designed by a register professional engineer. This design will be subject to approval by this department.

b. curb and gutter: City standard: MDOT F-4 modified with #4 re-bar.

c. sidewalks: the resolution does not address the construction of sidewalks. With regards to these properties, since sidewalk does not exist on the adjacent properties, the City will only require sidewalk be installed through the drive approaches and will not require the installation of sidewalks across the remaining frontage of these properties. If your client chooses to install sidewalk across the entire frontage of these properties the City will require that sidewalk to be 5 feet in width along the entire frontage each property. The sidewalk shall be 6 inches in depth across the drive approach and 4 inches in depth in all other locations. If at sometime in the future City Council orders the construction of sidewalks across the frontage of these properties, which is within Council's powers, that construction would most likely occur as a Public Improvement and assessments for this improvement would be placed on those properties benefitting from the improvement. Again, this would occur only if City Council so orders.

Item 6. We refer to items 6 and 7 in the attached City Council resolution which states: *"That the purchaser is responsible for the extension of all utilities from W North Street to the building site, including but not limited to storm, sanitary sewer, water, electrical and gas services"* and *"That the purchaser will be responsible for street improvements, including curb and gutter."* It seems clear that the purchaser of these houses has the burden of

funding all costs associated with the design and construction of all improvements required within the Council's resolution. However, as your client will be constructing these improvements under a "Letter of Intent", copy enclosed, the City will, as is stated in the City's "Letter of Intent", place the wearing course of asphalt upon Capitol Blvd. The wearing course will be placed after your client's contractor has placed the appropriate sand, gravel and leveling layer of asphalt in the roadway and the installation of those materials have met the City's specification for their construction.

Item 7. As defined in the City Ordinances, a public sewer, "means a sewer which all owners abutting properties have equal rights and which is controlled by a public authority. "Because these sewer will be public, any adjacent property must be allowed access to these sewers. Again, because your client will be construction these sewers under a "Letter of Intent," in accordance with City Ordinance Chapter 1042.11, if in future an adjacent property owner, whom did not bear any expense for the construction of such a sewers, desires to connect to either of these sewer, that property owner must pay a connection fee to the City. That fee will be calculated in accordance with the City Ordinance Ch. 1042.11, prior to making any such connection. Those connection fees will then redistributed to those properties which directly benefitted form their construction in the form of a reduction of any special assessments or regular property taxes. Please find enclosed a copy of City Ordinance 1042.11 for further explanation.

As with any development within the City, it is the obligation of the developer to gather specific data for the eventual design of those improvements required by the City. The City has specific minimum design requirements, as does the State of Michigan for sanitary sewers. These are minimum standards, the eventual design is based upon specific field conditions and best engineering practices.

If you, your client, or your clients engineers have any questions, please contact this office.

Sincerely,

Dean Johnson, P.E. City Engineer

enl.
C:\My Documents\Capitol Ave Homes2.wpd